Supreme Court, U. S.
FILED
SEP 19 1975
MICHAEL RODAK, JR., CLERK

No. 75-319

In the Supreme Court of the United States

OCTOBER TERM, 1974

WALTER J. CUKROWSKI, HELEN G. CUKROWSKI and KATHLEEN CUKROWSKI,

Petitioners,

vs.

MT. SINAI HOSPITAL, INC., DR. RICHARD L. FRANKLIN, DR. IRVIN M. BECKER, DR. WALTER HOGAN, DR. PHILLIP S. GUZELIAN, DR. HERBERT A. OXMAN and DR. HENRY M. GOLDBERG,

Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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This is a joint brief of the respondents in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin.

SUPPLEMENTAL STATEMENT OF FACTS

The petitioners' brief as well as the record in this case are filled with a number of self-serving statements and affidavits prepared by petitioners' attorney and either signed by him or by his clients, and notarized by him. There are also a number of statements of alleged fact

which have no foundation either in the record or in any other document on file with the Wisconsin Supreme Court.

The following is the time sequence from the record in this case:

1. February 15, 1967: Date of alleged malpractice. (R. p. 5).

2. August, 1969: Plaintiffs retained Attorney Mueller in approximately August, 1969 (R. p. 257, A-Ap. p. 142).

3. February 14, 1970: Papers were delivered to the Sheriff of Milwaukee County February 14, 1970, one day before the statute of limitations expired (R. p. 115, A-Ap. p. 101). Plaintiffs did not file the action in court until February, 1971 (R. p. 1).

4. March 9, 1970: Issues were joined between the defendants Goldberg and Becker and the plaintiffs March 9, 1970 (R. p. 120, A-Ap. p. 105).

5. February, 1970 to September 26, 1972: Plaintiffs took *no* action of record to prosecute their suit from February, 1970, to September 26, 1972 (a period of approximately 29 months), except one deposition to perpetuate the testimony of the plaintiff, Walter Cukrowski on February 9, 1971, and one attempted deposition of the defendant Oxman who was no longer a resident of Wisconsin (R. pp. 144-149).

6. September 11, 1972: The defendants Becker and Goldberg moved the court for an order sustaining their demurrer to the claim of the adult daughter of Walter Cukrowski seeking damages for alleged loss of the society and companionship of Walter Cukrowski, who was alive. Said demurrer was sustained (R. p. 118, A-Ap. p. 104).

7. September 26, 1972: Defendants Becker and Goldberg served all parties with a Notice of Trial (R. p. 120, A-Ap. p. 105).

8. October 30, 1972: Plaintiffs moved the court to strike the Notice of Trial, which motion was denied (R. p. 129, A-Ap. p. 106).

9. January 5, 1973: Trial court conducted a pretrial conference, at which time the court issued a pretrial order scheduling the case for trial as the No. 1 case commencing July 10, 1973 (six months notice) and set a schedule for the exchange of names of expert witnesses (R. p. 131, A-Ap. p. 107).

10. June 25, 1973: Defendants Becker and Goldberg moved the court for an order requiring the plaintiffs to comply with the pretrial order. Plaintiffs filed a motion seeking adjournment of trial date. Court ordered plaintiffs to comply with the pretrial order (R. pp. 185-187, A-Ap. pp. 125-127).

11. July 6, 1973: Plaintiffs filed an application for a Writ of Prohibition with the Wisconsin Supreme Court seeking a stay in the commencement of the trial. The application was denied (R. pp. 197-233).

12. July 10, 1973: Case called for trial and the plaintiffs failed to proceed. The court thereupon dismissed the suit for failure to prosecute (R. pp. 234-246, 278-291, 127-130).

13. Motion to reopen Judgment in trial court, September 11, 1973: Motion by plaintiffs to have the case remanded by the Wisconsin Supreme Court to the trial court for this hearing was denied by the Wisconsin Supreme Court.

14. The decision of Wisconsin Supreme Court, March 28, 1975.

15. April 15, 1975: Motion for rehearing accompanied by affidavit of E. Clinton Texter, Jr.

16. June 3, 1975: Motion for rehearing denied by Wisconsin Supreme Court.

The following is a record of the discovery and pretrial preparation by the plaintiffs:

1. No discovery was noticed, attempted, requested, or conducted of the principal physician defendants, Doctors Becker, Hogan and Franklin at any time from the commencement of the suit in February, 1970, to the date of the trial, July, 1973.

2. No discovery was noticed, attempted or conducted from August, 1969 (the date when the plaintiffs first employed Attorney Mueller) until February 16, 1973 (a period of 41 months) except for one hearing February 9, 1971, when the plaintiffs perpetuated the testimony of the plaintiff, Walter Cukrowski (R. p. 141), and except the attempted deposition of one defendant, a former surgical resident at the hospital, Dr. Oxman, who was no longer a resident of Wisconsin (R. 145-149).

3. A deposition of Eleanor Thompson, R.N., was noticed by the plaintiffs for February 16, 1973, and ordered by the Court to be held April 6, 1973, at 10:00 A.M. (R. p. 141, A-Ap. p. 111). The plaintiffs never conducted the scheduled deposition.

4. A deposition of Michael Elliot, Administrator of Mount Sinai Hospital, was scheduled for March 20, 1973, and ordered by the Court to be held April 23, 1973 (R. p. 161, A-Ap. p. 115). The deposition was conducted. Many

questions were objected to and certified. Plaintiffs' counsel never took any further action to obtain a court ruling on the certified questions.

5. The deposition of Dr. Norbert Enzer was noticed for March 15, 1973 (R. pp. 150, 151). Dr. Enzer was out of the country at the time. Plaintiffs' counsel never rescheduled the deposition.

6. No other deposition other than the above were noticed or conducted by the plaintiffs at any time from August, 1969, to July, 1973.

All references "A-Ap." are to pages of Appellants' Appendix in the Wisconsin Supreme Court. All references "R." are to pages of the Record in that court.

ARGUMENT

1. PETITION FAILS TO DEMONSTRATE SUFFICIENT REASON FOR GRANTING WRIT OF CERTIORARI.

Rule 19 of the Revised Rules of Supreme Court of the United States sets forth the considerations for granting a Writ of Certiorari. It points out in graphic terms that such Writ will be granted "only where there are special and important reasons therefor.

The Supreme Court has held that the purpose of granting such a Writ to review a Judgment of a state court is to be done sparingly and only in the most limited circumstances. The petitioners' brief fails to address itself to any of the legal bases that are required to be considered in determining whether a Writ should or should not be granted.

The Supreme Court stated in *Rice* v. *Sioux City Cemetery*, (99 L ed 897, 901; 349 US 70, 74; 75 S Ct 614) by way of illustration what reason might be determined "special and important" under Rule 19:

> "'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court'
>
> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Magnum Import Co. v. Coty, 262 US 159, 163, 67 L ed 922, 924, 43 S Ct 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Asociation, September 7, 1949, 69 Sup Ct v. vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 US 288, 341, 80 L ed 688, 707, 56 S Ct 466."

The Petition further fails to recognize the policy of the Court in avoiding a function of operating in such a manner as to give trials de novo. This policy was recognized by this court in *Stein* v. *New York*, (97 L ed 1522, 1540-1541; 346 US 156, 181; 73 S Ct 1077) where it is stated:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. But that does not mean that we give no weight to the decision below, or approach the record de novo or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. Milwaukee Electric R & Light Co. v. Wisconsin, 252 US 100, 106, 64 L ed 476, 480, 40 S Ct 306, 10 ALR 892. It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be

> tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."

See also, the policy of this Court with regard to findings and practices in a state court, *Michel* v. *Louisiana*, 350 US 91, 96; 100 L ed 83, 90; 76 S Ct 158.

In addition to failing to meet the requirement of the requisite legal standards for a Writ of Certiorari, petitioners also, by their numerous statements of purported fact, failed to "present with *accuracy*, brevity and clearness" (italics ours) the essential matters required in Supreme Court Rule 23 (4). The Rule specifies that failure to do this will be sufficient reason for denying the petition. That denial should take place in this matter.

2. THERE IS NO EVIDENCE THAT FINANCIAL CIRCUMSTANCES CAUSED ANY DELAY.

Petitioners in Question #1 of their Argument attempt to imply that it is impossible for a large segment of middle class Americans to obtain legal representation in the area of malpractice and personal injury claims. Nothing could be further from the truth since it is common knowledge that it is the common practice of the legal profession to handle such cases on a contingent fee basis regardless of the economical status of the client. Petitioners cite no cases or authorities to the effect that they have a constitutional right to delay and prolong litigation simply because it is being handled under a contingent fee.

Nor is there any evidence in the record regarding the fact that petitioners may or may not have financial resources to prosecute the case except again for bare statements by counsel in affidavits. In fact, the deposition of

the plaintiff, Walter Cukrowski, indicated that he was on a pension, his wife was employed as a hospital assistant, his daughter was employed as a hospital assistant, and he had a son who was a medical doctor.

The citation of *Padovani* v. *Bruchausen*, 293 F 2d 546 has no materiality on this point.

3. PETITIONERS WERE NOT DENIED DUE PROCESS OR EQUAL PROTECTION BY THE TRIAL COURT'S REFUSAL TO MODIFY THE PRETRIAL ORDER.

The petitioners imply that the trial court first ordered them to trial and then forbade them from using expert witnesses. In fact, the trial court ordered both sides to disclose the names of their expert witnesses according to a schedule adopted so as to allow plenty of time for pretrial discovery and preparation.

Under the Federal Rules as well as under the decisions of the Wisconsin Supreme Court such a pretrial order was appropriate. The Wisconsin Supreme Court has held that pretrial conferences should be held and orders issued based upon them. See *Schneck* v. *Mutual Service Cas. Ins. Co.*, 18 Wis 2d 566, 573; 119 NW 2d 342; and *Fredrickson* v. *Louisville Ladder Co.*, 52 Wis 2d 776; 191 NW 2d 193. In the *Fredrickson* case the Supreme Court particularly pointed out the power of the trial court to compel disclosure of the names of expert witnesses by pretrial order. It pointed out that the penalty for failing to do so could well be the exclusion of the expert(s)' testimony within the discretion of the trial judge.

Even without a provision for expert witness testimony petitioners could have proceeded to trial without the requirement of an expert witness using any of three legal

tools available to them at that time in the State of Wisconsin. They could have proceeded on the doctrine of *res ipsa loquitur* as set forth in the case of *Fehrman* v. *Smirl*, 20 Wis 2d 1; 121 NW 2d 255; 122 NW 2d 439. They could have proceeded under the doctrine of informed consent under the rule of *Trogun* v. *Fruchtman*, (1973) 58 Wis 2d 569; 207 NW 2d 297. Finally, petitioners could have proceeded by the use of learned treatises under the decision of *Lewandowski* v. *Preferred Risk Mut. Ins. Co.*, 33 Wis 2d 69; 146 NW 2d 505.

Petitioners also could have used the "national standards" doctrine of medical evidence recognized to exist by the Wisconsin Supreme Court in the case of *Schier* v. *Friedman*, 58 Wis 2d 269, 281-283; 206 NW 2d 166; 208 NW 328.

Furthermore, petitioners had three weeks between the *Schier* decision and the date by which they were to furnish their expert(s)' names. The affidavit on rehearing in the Wisconsin Supreme Court showed that Dr. Texter was available and could have testified either on the "locality standard" or on the *post-Schier* standard. Petitioners offered no explanation why they did not present his name.

The following excerpt from the Wisconsin Supreme Court opinion accurately shows the state of the record at the time the exclusionary Order was entered:

> "At the hearing on June 25, 1973, counsel for the plaintiffs argued to the trial court that the *Shier* case now enabled him to obtain medical experts to testify whereas his attempts to obtain a medical expert in the Milwaukee area had been unsuccessful. At no time did counsel indicate that he had any specific witnesses in mind or that he was in contact with any such witnesses. The trial court responded, in effect, that without more specific information as to who the plaintiffs

> intended to call, and when the plaintiffs would be ready for trial, he would not extend the trial date or relieve the plaintiffs of the obligation to notify the defendants of the experts' names as provided in the pretrial order."

As can be seen, the trial court all but begged petitioners' attorney to furnish him some basis for according him relief.

4. DEMURRER WAS MOOT SINCE TIME FOR APPEAL HAD RUN.

An order sustaining the demurrer to the complaint of Kathleen Cukrowski was entered September 11, 1972 (A-Ap. 104, R. 118). Under Wisconsin Statutes 2d 274.01, cited at Page 5 of petitioners' brief the appeal time extended no longer than six months. This was an appealable order from which no timely appeal was taken. The Wisconsin Supreme Court has held such an order to be appealable such as stated in *Last* v. *Puhler*, 19 Wis 2d 291, 293; 120 NW 2d 120, stating at Page 293:

> "Hallows, J. The order sustaining the demurrer and dismissing the complaint amounts to a final determination of the rights of the parties to the action and therefore is in effect a judgment and appealable. Sec. 270.53 (1), Stats. An order dismissing the complaint may be treated by this court as a judgment. *State* v. *Donohue* (1960), 11 Wis 2d 517; 105 NW 2d 844. See *Russell* v. *Johnson* (1961) 14 Wis 2d 406, at page 412, footnote 7, 111 NW 2d 193; *State* v. *Eigel* (1933) 210 Wis 275; 246 NW 417."

There is no need to discuss this matter before the Wisconsin Supreme Court since no timely appeal was taken.

5. NO EVIDENCE TO SUPPORT CONTENTION THAT ALLEGED SETTLEMENT OFFERS WERE USED BY COURTS AGAINST PETITIONERS.

In Questions #4 and #5, petitioners again cited matters which have no basis in the evidence or the record of this case apart from their own self-serving affidavits. These matters involve reference to alleged settlement offers. The inference is then drawn by counsel for petitioners that these alleged settlement offers were used as some sort of a club or wedge to compel settlement or dismissal. There is absolutely nothing in the record of this case at the trial level or at the appellate level to justify such an inference.

CONCLUSION

It is respectfully submitted that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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